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No. 88-2123

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE,
v. *Petitioner,*

FEDERAL LABOR RELATIONS AUTHORITY
AND NATIONAL TREASURY EMPLOYEES UNION,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF OF THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AND THE AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES AS *AMICI CURIAE*
SUPPORTING RESPONDENTS**

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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	1
ARGUMENT	2
Introduction And Summary Of Argument	2
I. Petitioner's Arguments Regarding Management Rights	6
II. The Nature of the Protection for Management Rights Provided By 5 U.S.C. § 1706 (a)	8
CONCLUSION	14

TABLE OF AUTHORITIES

Cases

<i>AFGE, Local 2782 v. FLRA</i> , 702 F.2d 1183 (D.C. Cir. 1983)	10, 12
<i>AFSCME, Local 3097</i> , 31 FLRA No. 30 (1988)	4, 5, 13
<i>Bureau of Alcohol, Tobacco & Firearms v. FLRA</i> , 464 U.S. 89 (1983)	12
<i>Department of Defense v. FLRA</i> , 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982)	10
<i>EEOC v. FLRA and AFGE</i> , 476 U.S. 19 (1986)	2
<i>General Services Admin.</i> , 27 FLRA No. 1 (1987) ..	5
<i>Headquarters 97th Combat Support Group (SAC), Blytheville Air Force Base</i> , 22 FLRA 656 (1986)	13
<i>Marine Corps Logistics Support Base</i> , 3 FLRA 397 (1980)	13
<i>U.S. Marshals Service v. FLRA</i> , 708 F.2d 1417 (9th Cir. 1983)	9

Statutes

5 U.S.C. § 7103 (a) (9)	<i>passim</i>
5 U.S.C. § 7106 (a)	<i>passim</i>
5 U.S.C. § 7106 (b)	3
5 U.S.C. § 7117	2
5 U.S.C. § 7121	4, 11
5 U.S.C. § 7122	9

TABLE OF AUTHORITIES—Continued

<i>Legislative History</i>	Page
H. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978) (<i>reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978: Subcomm. of the Committee on Post Office and Civil Services, 96th Cong., 1st Sess. ("Leg. Hist.")</i>)	4
H. Rep. No. 95-1403, 95th Cong., 2d Sess. 40, 44 (1979) (<i>reprinted in Leg. Hist. at 686, 690</i>)	11
124 Cong. Rec. H9634 (daily ed. September 13, 1978) (<i>reprinted in Leg. Hist. at 924</i>)	12
124 Cong. Rec. H13609 (daily ed. October 14, 1978) (<i>reprinted in Leg. Hist. at 998</i>)	12
<i>Miscellaneous</i>	
Frazier, <i>FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation</i> , 81 Fed. Labor Rel. Rep. No. 9 (June 1981)	8

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SUPPORTING RESPONDENTS**

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of this Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 14,000,000 working men and

women, many of whom are federal government employees directly affected by the statute at issue in this case.

The American Federation of Government Employees, AFL-CIO (AFGE), is the largest non-postal federal sector labor union, and is affiliated with the AFL-CIO. AFGE represents the interests of members of its bargaining units by, *inter alia*, negotiating collective bargaining agreements with federal agency employers and representing unit employees through negotiated grievance and arbitration procedures. AFGE and its members have a vital interest in the outcome of this case. AFGE was the respondent in *EEOC v. FLRA and AFGE* before this Court in No. 84-1728, *cert. dismissed* (as improvidently granted), 476 U.S. 19 (1986), which involved issues quite similar to those in this case.

ARGUMENT

Introduction and Summary of Argument

The issue in this case is whether a proposal made by Respondent National Treasury Employees Union ("NTEU") in the course of its collective bargaining with the Petitioner, the Internal Revenue Service ("IRS"), is subject to the good faith bargaining requirement of Title VII of the Civil Service Reform Act of 1978 ("the Act"), 5 U.S.C. § 7117, or is instead outside that duty because requiring bargaining over the proposal would "affect the authority" of the IRS to exercise management rights regarding the contracting out of work, which rights are protected by § 7106(a)(2)(B).¹

¹ Section 7106(a)(2)(B) provides in its entirety as follows:

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

* * *

(2) In accordance with applicable laws—

The proposal in question calls for the collective bargaining agreement to explicitly state that NTEU is entitled to use the parties' grievance and arbitration procedures to resolve disputes over whether IRS contracting-out decisions are in compliance with Office of Management and Budget ("OMB") Circular No. A-76. That circular "establishes Federal policy regarding . . . whether commercial activities should be performed under contract with commercial sources or in-house using Government facilities and personnel." OMB Circular No. A-76 (August 4, 1983), paragraph 1 (*reprinted* in Pet. Br. App. at 1a). The Federal Labor Relations Authority ("FLRA"), following a long line of consistent precedents on this issue, held that the NTEU proposal is nothing more than an effort to memorialize in the agreement the union's statutory right to utilize the negotiated grievance procedure for the resolution of a "grievance," and is therefore not an interference with protected management rights.

Under the statute, a "grievance" includes "any complaint . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regu-

* * *

- (B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted[.]

Section 7106(b) limits these management rights as follows:

- (b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

lation affecting conditions of employment," 5 U.S.C. § 7103 (a) (9) (C) (ii). And, the statutory phrase "rule or regulation" includes all "official declarations of policy of an agency which are binding on the officials and agencies to which they apply."² Moreover, the statute explicitly guarantees that negotiated grievance and arbitration procedures *must* be available to resolve all "grievances," 5 U.S.C. § 7121. Since parts of the OMB Circular bind the IRS, the FLRA concluded that the Circular is—to the extent it is binding—a "rule or regulation." Pet. App. 13a. Thus, "[d]isputes involving conditions of employment arising from the application of OMB Circular A-76 would be covered by the negotiated grievance procedure, even in the absence of [NTEU's proposal]." Pet. App. 15a. *See also AFSCME, Local 3097*, 31 FLRA No. 30 (1988) (more detailed summary of precedents and reasoning in a case involving the identical issue).

Accordingly, the FLRA concluded that the NTEU proposal was within the duty to bargain, since the proposal would not "affect the authority" of the IRS to exercise the management right of contracting out work. 5 U.S.C. § 7106(a) (2) (B). Whatever the substantive limits on the IRS's authority may be, those limits are imposed by the force of OMB Circular No. A-76—a source external to the Act—and not by the NTEU proposal at issue. Pet. App. 15a.³

² H. Conf. Rep. No. 95-1717, 95th Cong., 2d Sess. 158 (1978) (*reprinted in* Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978: Subcomm. of the Committee on Post Office and Civil Services, 96th Cong., 1st Sess. ("Leg. Hist.") at 826).

³ In this regard NTEU's proposal conforms to a common practice in the federal sector, where collective bargaining agreements often refer extensively to restrictions placed on the employer by public law and often note the availability of the grievance procedure to enforce these restrictions should an employee be injured by an employer's noncompliance. Although such provisions have no independent legal effect—the restrictions would be enforceable through the grievance procedure even if not mentioned in the

Given the FLRA's rationale, much of the dispute in this case has focused on whether the FLRA properly classified OMB Circular No. A-76 as a "rule or regulation," as that phrase is used in the definition of "grievance" in 5 U.S.C. § 7103(a) (9) (C) (ii).⁴ We believe that the FLRA was entirely correct in its decision on this issue. Because we believe that this issue is fully and adequately treated in Respondents' briefs, we will not reexamine it here.

Nevertheless, we believe a separate response is appropriate with regard to one contention repeatedly urged by Petitioner. Petitioner contends that the Act's provisions regarding grievance and arbitration procedures, 5 U.S.C. § 7103(a) (9) and § 7121, must be narrowly construed to prevent such procedures from "affecting" in any way management decisions in those areas where 5 U.S.C. § 7106(a) recognizes substantive management rights. *See, e.g.,* Pet. Br. 28-29, 31-38. Put simply, this contention is in patent conflict with the Act's language, structure and history, as well as with the consistent view of the FLRA, the agency responsible for enforcing the Act.

agreement—federal agencies and unions nevertheless often employ these provisions to highlight the particular restrictions to managers and employees, to note the parties' recognition of these restrictions as of particular importance to them, and to memorialize the parties agreement that these legal obligations will be complied with in the best of faith.

⁴ Petitioner's brief initially focuses on whether OMB Circular No. A-76 is an "applicable law" under 5 U.S.C. § 1706(a) rather than on whether it is a "law, rule, or regulation" under 5 U.S.C. § 7103(a) (9) (C) (ii). Pet. Br. 22-29. Later, Petitioner concedes that the Circular would be subject to the grievance procedure so long as it is a "law, rule, or regulation" regardless of the meaning of "applicable law," Pet. Br. 37-38. The FLRA has made it quite clear that the relevant inquiry is whether the Circular is a "law, rule, or regulation" under 5 U.S.C. § 7103(a) (9) (C) (ii) and that analysis of the "applicable law" language of 5 U.S.C. § 7106(a) is largely irrelevant. *AFSCME Local 3097, supra*, 31 FLRA No. 30, at 18; *General Services Admin.*, 27 FLRA No. 1, at 7-8 (1987).

As we will show, although Congress did not intend *this* Act to diminish the substantive scope of management authority in certain areas, Congress did recognize that *other sources of law* imposed myriad substantive restrictions on management authority in those areas; and most to the point, Congress made explicit that disputes over management's compliance with such restrictions—from whatever source—are to be resolved through the grievance and arbitration procedures that are the centerpiece of this Act. While the Act's management rights provision may well determine the substantive scope of those rights, and thus the outcome in certain arbitrations, there is simply no support for the proposition Petitioner urges here, that the Act's arbitration procedures themselves should be viewed as interferences with reserved management rights.

I. Petitioner's Arguments Regarding Management Rights

Repeatedly, Petitioner's brief urges that the Act's management rights provision, 5 U.S.C. § 7106(a), is the centerpiece of this case, and suggests that its import is to remove issues of management rights from the statutory definition of "grievance", 5 U.S.C. § 7103(a)(9)(C)(ii), and thus from the arbitration process required by 5 U.S.C. § 7121. In essence, Petitioner argues that § 7106(a) stands for the broad proposition that the operations of the Act must be prevented from "affecting" management actions in any way in those myriad areas—including contracting out—specified as areas of management rights.⁵ To effectuate this supposed statutory goal, Petitioner urges that

⁵ The activities listed in § 7106(a) include, in part, the following: "to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and . . . in accordance with applicable laws— . . . to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees; [and] to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted." 5 U.S.C. § 7106(a)(1-2)(A-B).

the definition of "grievance," 5 U.S.C. § 7103(a)(9), and of the scope of grievance and arbitration procedures, § 7121, should be narrowly construed when the employer's conduct involves an area of activity mentioned as involving a management right in § 7106(a). Only through such a narrow construction, Petitioner argues, will the statute fulfill the purpose of assuring to the maximum extent that management actions in these areas will be unhampered. *See, e.g.*, Pet. App. 28-29 ("binding arbitration would make an outside arbitrator, rather than the agency, the final authority on compliance with [the federal policies in these areas] and would thus fly in the face of the clear directive of Section 7106 that 'nothing in [Title VII] shall affect the authority of any . . . agency' to make decisions" in these areas); Pet. App. 31 ("increased delays and uncertainties [associated with arbitration] would impermissibly 'affect' agency authority"); Pet. App. 35 ("Title VII compels the conclusion that agency contracting-out decisions may not be subjected to grievance and arbitration because such grievance and arbitration would 'affect' management's reserved authority"); Pet. App. 38 (giving "expansive definition" to "grievance" would "override the explicit mandate" of § 7106(a) that management actions in specified areas be unfettered).

Of course, Petitioner's argument goes well beyond the realm of contracting-out decisions and applies equally to all activities listed in § 7106(a). As even a cursory review of the activities listed in § 7106(a) reveals, *see* note 5, *supra*, vast numbers of management personnel actions may implicate a "management right." Thus, if the scope of the grievance and arbitration procedures must be construed narrowly whenever the challenged management actions involve an activity named in § 7106(a), the scope and efficacy of the grievance and arbitration procedures mandated by the Act will be slight indeed.

II. The Nature of the Protection for Management Rights Provided By 5 U.S.C. § 7106(a)

The language, structure and history of the Act—as well as the decisions of the FLRA and of numerous courts—demonstrates that the protections offered to management rights in § 7106(a) were never intended to assure that management actions or decisions in those spheres are outside the statute's grievance and arbitration procedures.

A. The language of the statute provides no support for the proposition that management rights protections under § 7106(a) should be read as limiting access to the grievance and arbitration process.

First, the definition of "grievance" is quite broad, with no limitation of access to the grievance procedure relating to the management rights provision. A grievance includes "any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment. § 7103(a)(9)(C)(ii) (emphasis added). Even the briefest perusal of those activities itemized as management rights in § 7106(a) reveals that virtually all such activities are likely to "affect" conditions of employment, and that a vast portion are at least partially governed by laws, rules, or regulations. Clearly the authors of § 7103(a)(9)(C)(ii) expected that grievances would commonly involve disputes regarding the validity of assertions of management rights. Indeed, Congress was well aware that, as a former member of the FLRA has observed, there is an "immense body of law which governs nearly every aspect of the employment relationship between federal employees and their employer the Federal Government." Frazier, *FLRA Policy and Practice on Arbitration Appeals: The Role of Regulation*, 81 Fed. Labor Rel. Rep. No. 9 (June 1981).

As Judge (now Justice) Kennedy has written, the very wording of the "grievance" definition indicates Congress's intent that management rights issues be subject to arbi-

tration, for "[t]he management rights section of the Act is a law affecting conditions of employment . . . and its meaning [is] properly before [an] arbitrator." *U.S. Marshals Service v. FLRA*, 708 F.2d 1417, 1421 n.5 (9th Cir. 1983).⁶

Second, the text of § 7106(a) stops substantially short of any declaration that nothing in the Act shall in any way "affect" management's actions in the areas covered by the section. Section 7106(a) goes only so far as to declare that the Act does not, of itself, "affect the authority" of management with respect to the itemized activities. This language preserves only management's substantive legal authority as is provided—and limited—elsewhere in the law. And does *not* exempt management from any of the Act's procedures.

The Act, moreover, as we have seen, expressly alters the position of management in one highly significant way, albeit a way that does not affect the substance of management's "authority": To the extent management actions are alleged to exceed the limits that other sources of law place on management's authority, those actions have been explicitly made subject to the Act's grievance procedures by § 7103(a)(9)(C)(ii)'s definition of "grievance." Nothing in § 7106(a) in any way calls into question the ability of an arbitrator—the statute's chosen decisionmaker, *see* 5 U.S.C. § 7123(b)(3)(C)—to determine whether, in any given instance, management actions conformed to whatever legal limits on those actions may have existed.

Third, the entire management rights provision of the Act is modified by 5 U.S.C. § 7106(b), which *inter alia* makes clear that the preservations of management "au-

⁶ Of course, as Judge (now Justice) Kennedy noted in *U.S. Marshals Service*, *supra*, 708 F.2d at 1419 n.2 & 1421 n.5, all parties to an arbitration under the Act may appeal an arbitrator's award to the FLRA, which may correct the award if it is contrary "to any law, rule, or regulation," 5 U.S.C. § 7122, including the Act's management rights provision.

thority" contained in § 7106(a) do not limit the ability of the parties to adopt "procedures" which management can be required to "observe in exercising any authority" it may have. 5 U.S.C. § 7106(b)(2). This provision thus makes clear that the preservation of management "authority" contained in § 7106(a) extends only to the issue of *substantive* standards for the exercise of authority; *procedures* for determining whether substantive standards are followed are clearly subject to collective bargaining, even as to matters that may "affect" management's exercise of its authority. See e.g., *AFGE, Local 2782 v. FLRA*, 702 F.2d 1183, 1186-1187 (D.C. Cir. 1983) (Scalia, J.) (§ 7106(a) only prevents "direct effect on substantive rights" of management and does not limit establishment of employee procedural rights respecting management's exercise of its powers); *Department of Defense v. FLRA*, 659 F.2d 1140, 1151-1152 (D.C. Cir. 1981) (contrasting agreements that alter management's substantive authority, and are thus invalid under § 7106(a), and those that establish procedures for determining correctness of management's application of its authority, and are thus valid under § 7106(b)(2)), *cert. denied*, 455 U.S. 945 (1982).

Finally, the conclusion that actions challenging management as exceeding its authority in areas of management rights are fully subject to arbitration procedures is demonstrated by the wording of the Act's arbitration provision itself. First, the general requirement that all unresolved grievances be subject to arbitration is limited only by five narrow classes of cases that are excluded from arbitration: there is no general exclusion for cases involving management rights. See 5 U.S.C. § 7121(c)(1) (excluding cases involving employees' prohibited political activities); § 7121(c)(2) (insurance cases); § 7121(c)(3) (suspension and removal cases involving national security); § 7121(c)(4) (examination, certification, or appointment cases); § 7121(c)(5) (certain classification cases). Second, the fact that a number of these classes

of cases may substantially implicate management rights, see 5 U.S.C. § 7121(c)(3-5), indicates that Congress well-understood that the run of cases implicating management rights would be arbitrated, and the arbitrator would decide the management rights issue.

B. The legislative history of the Act makes explicit that Congress envisioned arbitration as the fully appropriate forum for disputes over management rights issues.

In reporting the bill which contained the provisions that eventually became 5 U.S.C. § 7103(a)(9) and 5 U.S.C. § 7106(a), the House Report was crystal clear that management rights disputes should be resolved through arbitration.

First, the provision defining "grievance" was in all relevant respects identical to the final version, and the Committee stated that the definition was intended to be "virtually all-inclusive." H. Rep. No. 95-1403, 95th Cong., 2d Sess. 40 (1978) (*reprinted in Leg. Hist. at 686*).

Second, in discussing an earlier, but quite similar version of the management rights provision, the Report stated that "[t]he committee intends that section 7106 . . . be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal." H. Rep. No. 95-1403, *supra*, at 44 (*reprinted in Leg. Hist. at 690*).

An equally clear reaffirmation of Congress's intent that management rights issues be fully subject to the arbitration process was made by Representative Udall, the author of the final version of § 7106. In a floor speech explaining the provision's meaning, Udall stressed that the management rights provision is "to be treated narrowly as an exception to the general obligation to bargain." He then explicitly stated that management exercise of "a reserved management right . . . in no way affect[s] the

employee's rights to appeal the decision . . . through the procedures set forth in a collective bargaining agreement." 124 Cong. Rec. H9634 (daily ed. September 13, 1978) (reprinted in *Leg. Hist.* at 924 (emphasis added)).

This history makes unmistakable that § 7106 "in no way" limits the arbitrability of disputes.⁷

C. Not surprisingly, given the statute's language and legislative history, the proposition that the submission of management rights disputes to arbitrators must be construed as an interference with protected management rights is put forward by Petitioner with no citation to supportive FLRA decisions. The FLRA—an administrative body that "is entitled to considerable deference when it exercises its special function of applying the general provisions of the Act to the complexities of federal labor relations," *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97 (1983)—has never accepted such a proposition.

Early in the history of this statute—and consistently thereafter—the FLRA clearly stated that disputes over

⁷ A clear statement of this principle was also made by Representative Ford, a member of the House conference committee who "played a key, critical role" in the management of the bill. *AFGE Local 2782 v. FLRA*, *supra*, 702 F.2d at 1197 (Scalia, J.). Representative Ford's statement could not be clearer:

Section 7103(a) (9) includes within the definition of "grievance," "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." Under this definition as adopted by the conferees, so long as a rule or regulation "affects conditions of employment", infractions of that rule or regulation are fully grievable even if the rule or regulation implicates some management right. This interpretation of the definition is required both by the express language of the section and by the greater priority given the negotiability of procedures over the right of management to bar negotiations because of a retained management right. [124 Cong. Rec. H13609 (daily ed. October 14, 1978) (reprinted in *Leg. Hist.* at 998).]

management rights issues are fully subject to arbitration: assertions that management rights are at issue go not to the suitability of the case for arbitration, but to the merits. See *AFSCME Local 3097*, *supra*, 31 FLRA No. 30, at 9-10; *Marine Corps Logistics Support Base*, 3 FLRA 397, 398-399 (1980). See also *U.S. Marshals Service v. FLRA*, *supra*, 108 F.2d at 1421 n.5 (Kennedy, J.).

Moreover, the FLRA has been scrupulous in recognizing that management rights issues may require that an arbitrator—once reaching the merits—refuse enforcement to contract terms contrary to substantive management rights or limit remedial options in order to prevent the arbitration process from infringing protected management rights. Indeed, the FLRA's position regarding permissible remedies in cases claiming an agency's non-compliance with OMB Circular No. A-76 illustrates this point. In *Headquarters 97th Combat Support Group (SAC), Blytheville Air Force Base*, 22 FLRA 656, 661-62 (1986), the FLRA made clear that although respect for management rights does not lead to a conclusion of non-arbitrability, it does require that arbitrators enforce the Circular *only* with respect to clearly mandatory provisions of sufficient specificity to facilitate objective assessment of compliance, and that available remedies be severely limited so as not to interfere with the discretionary aspects of agency decisionmaking under the Circular. *Id.*

D. As the foregoing demonstrates, the language, structure, legislative history, and administrative case law are entirely consistent. The arbitration of management rights issues is—and has always been—the norm under this Act. Submission of these issues simply *cannot* be construed as in any way undermining legitimate management rights as Congress defined those rights.

The novel proposition raised by Petitioner—that respect for management rights mandates avoiding arbitration

through narrowly construing the grievance and arbitration provisions of the Act when management rights are involved—is simply contrary to all the materials: the proposition should be soundly rejected.

CONCLUSION

For the foregoing reasons, as well as for those stated in respondents' briefs, the decision of the Court of Appeals in this case should be affirmed.

Respectfully submitted,

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